SUPREME COURT, U. S.

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No. 405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

LEROY POWELL,

Appellant

vs.

THE STATE OF TEXAS,

Appellee

On Appeal From the County Court at Law No. 1 of Travis County, Texas

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REPLY BRIEF FOR APPELLANT

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March, 1968

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REPLY BRIEF FOR APPELLANT

The Texas Attorney General's very candid brief[1] readily frames the points at issue in this case. First, he contends that Appellant's public intoxication was the result of his deliberate and free choice and not the involuntary product of his disease. Second, he believes that criminal punishment of derelict alcoholics for their public intoxication serves both deterrent and re-

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[1]The Texas Attorney General's brief does not represent the views of the entire government of the State of Texas. The Texas Commission on Alcoholism has entered an appearance in this case as amicus curiae in support of Appellant.

habilitative purposes, and therefore should be continued. It is thus clear that, if this Court does not reverse the lower court's judgment, Appellant and thousands of other alcoholics throughout the country will remain in the revolving door between skid row and the local workhouse for the rest of their lives.

Appellee raises six arguments, none of which are tenable, in an effort to perpetuate the injustice evidenced by this appeal. Properly analyzed, these specious contentions are readily unveiled as being without support in either logic or authority.

1. THE TRIAL COURT'S FINDINGS OF FACT.

Appellant does not dispute that, where justice requires it, this Court may set aside the Findings of Fact of a lower court. In this case, however, the Texas Attorney General's position is unique. He may be the first *appellee* in this Court who was compelled to ask that the lower court's Findings of Fact be disregarded in order that its judgment may be upheld. Indeed, he appears to concede that, unless those Findings of Fact are ignored, he cannot prevail.

The Brief for Appellant and the Brief for Amici Curiae set out in abundant detail references to the record evidence and to unimpeachable medical, scientific, correctional, religious, and lay authorities supporting the lower court's Findings of Fact. These authorities establish that an alcoholic drinks involuntarily as a result of a poorly-understood but unmistakable disease. Three United States Courts of Appeals have held without dissent, in the *Driver*,[1] *Easter*,[2] and

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[1] *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

[2] *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966) *(en banc)*.

Sweeney[1] cases, that alcoholism is a disease that deprives its victims of the ability to control their drinking.

To balance the overwhelming weight of expert opinion, Appellee offers a distorted reading of one portion of Dr. Wade's testimony taken out of context, together with a short quotation from a leading medical text that, standing alone, supports Appellant's contentions and, if read in context, unquestionably requires reversal of the lower court's opinion.

Dr. Wade testified that, when sober, Appellant (like any alcoholic) understands that he is taking a drink. His act of raising a glass or bottle to his lips is voluntary, in that there is no insanity or physical compulsion involved. But at the same time, the alcoholic is under both a "compulsion" or "exceedingly strong influence" to drink, and the illusion that he will be able to control his drinking and will not become intoxicated. As Dr. Wade testified under cross-examination:

> "It has been my experience that each alcoholic wakes up on the world from each drunk with the full feeling and resolution in his heart that he is going to be able to drink from now on, and they seem to believe that this time is going to be different, that they are going to have this one or two drinks, and they are going to quit this time." (A. 22)

Jellinek similarly recognized the alcoholic's inability to appreciate the nature and consequences of the first drink.[2]

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[1] *Sweeney v. United States*, 353 F.2d 10 (7th Cir 1965).

[2] Jellinek, *The Disease Concept of Alcoholism* 42 (1960).

The "compulsion" or "exceedingly strong influence" to take the first drink, to which Dr. Wade refers (A. 24, 26), is well recognized by the medical profession. The World Health Organization has stated that "compulsive craving and dependence can develop in those individuals whose make-up leads them to seek and find an escape in alcohol.'" An alcoholic's resumption of drinking after a period of abstinance results from "the building up of physiological tension which provokes a 'pathological desire' for alcohol as a means of relieving this tension," or from "a physiopathological condition.'" Jellinek observes the same "accumulation of tension,'" and throughout this book describes the alcoholic's inevitable return to drinking as an "inability to abstain.'" The Texas Commission on Alcoholism has characterized this inability to abstain as "an overwhelming compulsion to drink alcohol'"[10]—virtually the same language as Dr. Wade's.[11]

Very few alcoholics are continuously intoxicated. The fact that Appellant, like other alcoholics, is able to remain sober for periods of time before reverting to drunkenness in no way weakens a diagnosis of alcoholism.[12]

Appellee's argument comes down to this—Appel-

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[7]WHO Committee on Alcohol, *First Report,* Tech. Rep. Ser. No. 84, at 11 (March 1954).

[8]WHO Expert Committee on Alcohol and Alcoholism, *Report,* Tech. Rep. Ser. No. 94, at 6 (June 1955).

[9]Jellinek, *The Disease Concept of Alcoholism* 141 (1960).

[10]*Id.* at 35-45.

[10]Texas Commission on Alcoholism, Law Enforcement *Handbook on Alcohol Problems* 13 (undated).

[11]A. 18-20, 23-24, 26-27.

[12]See, e.g., Jellinek, *The Disease Concept of Alcoholism* 35-45 (1960).

lant has freely chosen his life as a destitute inebriate. Appellee has seized upon a short passage from Dr. Wade's testimony in a vain attempt to establish some medical basis for this position, and chooses to ignore the fact that the American Medical Association and the Texas Commission on Alcoholism have flatly contradicted his contentions. His brief cites no other authority for the contention that alcoholics drink voluntarily. It is thus apparent that the Findings of Fact of the court below must stand.

2. THE "DISEASE" OF ALCOHOLISM.

Appellee argues that because "disease" is a vague term, persons afflicted with disease—or at least with mental disease and alcoholism—may properly be punished under the criminal law. This is an obvious attack upon this Court's decision in *Robinson v. California,* 370 U.S. 660 (1962), which rested on the finding that narcotic addiction is now recognized as a disease.

The same vagueness that is ascribed to "alcoholism" and "disease" is inherent in the term "insanity." Treatment of insanity is equally difficult, and the diagnosis and legal determination of insanity is probably even more difficult than for alcoholism. And there are many more mentally ill persons in this country than there are alcoholics. Does this justify refusal to recognize any form of insanity as a defense to a criminal charge? Can an admittedly insane person constitutionally be convicted for conduct that was unquestionably caused by his insanity, or be required to stand trial or be executed while insane, simply because of uncertainty about the diagnosis and etiology of this disease?

This Court has already answered these questions. The same rationale is equally applicable to alcoholism.

3. MAN'S FREEDOM OF WILL.

Appellant agrees that it is unnecessary to take a stand on philosophical questions. The question in this case, however, is not a philosophical one. It is the practical question whether involuntary behavior—an alcoholic's public intoxication—can be made a criminal offense. At issue is whether Appellant, and others like him, will spend their lives in jail merely for exhibiting the symptom of their illness in public.

On page 16 of his brief, Appellee again argues that:

> "There was a subjective consciousness of freedom to choose each time appellant began to drink, knowing that his past experience had been that he would continue to ingest alcohol to the point of public drunkenness."

This directly conflicts with Dr. Wade's testimony, and is unsupported by record evidence or medical authority.

Appellee's citation of Glanville Williams at page 14 of his brief is equally unpersuasive. Professor Williams was there discussing *voluntary* drunkenness, not the involuntary drunkenness of an alcoholic. In a later chapter he fully recognizes the difference between voluntary drinking and alcoholism:

> "Still another situation for which a sound penal theory should provide is where the offender is an alcohol addict. He may have become predisposed to this through some injury or he may be congenitally prone. In either event it is unrealistic to say that on the occasion in question the getting

drunk was his voluntary act, in the sense that it was something he could have avoided." Williams, *Criminal Law:* The General Part § 181, at 567 (2d ed. 1961).

Appellee's attempt to justify criminal detention of chronic inebriates as humane and productive contradicts not only the very authorities cited for support, but every other major study of this problem. The President's Commission on Law Enforcement and Administration of Justice, and Pittman and Gordon, cited at page 17, both expressed outrage at the use of criminal sanctions to handle chronic inebriates.[13] More recently, Professor Kadish has stated that "no single experience so drastically exemplifies the misuse of the criminal law."[14]

The substance of Appellee's position is that criminal incarceration of sick people is justified because these sick people are handled humanely in jail. Assuming arguendo that they are treated humanely—a proposition flatly rejected by both the U.S. and D.C. Crime Commissions[15]—would this mean that any sick person may be jailed for his illness as long as he is treated decently? Could he be locked up on the pretext that, as Appellee's brief states at page 15, he will be "given food, clothing, shelter, and a period of compulsory

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[13] *Report by the President's Commission on Law Enforcement and Administration of Justice* 233-237 (1967); Pittman & Gordon, *Revolving Door: A Study of the Chronic Police Case Inebriates* 1, 42, 139, 142 (1958).

[14] Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 157, 166 (November 1967).

[15] The D.C. Crime Commission found, for example, that 16 persons arrested for intoxication died while in police custody in 1964-1965. *Report of the President's Commission on Crime in the District of Columbia* 476 (1966).

continence?" No one questions that a State may provide proper treatment for sick people, but no one has ever seriously suggested that this may constitutionally be done through the criminal process.

The U.S. and D.C. Crime Commissions, and the Cooperative Commission on the Study of Alcoholism, have all rejected criminal sanctions as ineffective either to deter drunkenness or to rehabilitate alcoholics.[11] The World Health Organization's most recent report on alcoholism adds yet another voice to this unanimous view:

> "Punishment of the drunken offender does not prevent the person dependent on alcohol from repeating over and over again his self-destructive, almost suicidal behavior, which often seems designed to invite punishment. The fining and imprisonment of these and other drug-dependent persons does not prevent recidivism if other measures are not taken as well." WHO Expert Committee on Mental Health, *Services for the Prevention and Treatment of Dependence on Alcohol and Other Drugs,* Tech. Rep. Ser. No. 363, at 21 (1967).

Appellee rejects these impressive authorities without a single citation to opposing authority.[12]

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[11] See Brief for Amici Curiae ACLU et al. at 33-35, 53-55.

[12] The North American Judges Association, which has joined in submitting an amicus brief in this case, considers this problem of such importance that it conducted a special survey of its members to provide an up-to-date estimate of the impact of alcoholism upon the nation's lower courts. 194 American courts, having jurisdiction over 12% of the country's population, reported over 750,000 arrests for simple drunkenness under various types of statutes and ordinances during the past calendar or fiscal year, an average of about 3,900 arrests per reporting court. Some courts reported only arrests that resulted in a court appearance. Many reporting

Following the time honored tradition, Appellee attempts to play the alarmist by suggesting some correlation between alcoholism and crime.[14] No one questions that a large number of offenders have consumed alcoholic beverages before committing a crime. There is absolutely no evidence, however, that *alcoholics* become drunk and then, because their inhibitions are released, commit serious crimes.[15] None of the authorities cited by the Texas Attorney General remotely suggests such a pattern.

4. *Durham v. United States*

Appellant has never argued that the *Durham* rule[16] should be applied across the nation. *Durham* involved mental illness, and the instant case does not. Alcohol-

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courts did not maintain information on repeat offenders. Those who did—137 out of 194—reported that 250,000 of a total of 550,000 arrests, or 46% of the arrests they reported, involved persons arrested for drunkenness two or more times during the year. Repeat offenders averaged 5.3 arrests during the period. Communication from Judge James A. Maloney, Albuquerque, New Mexico, N.A.J.A. Board Member. The U.S. Crime Commission estimated, from incomplete data, that at least 2,000,000 arrests in 1965 were for intoxication. *Report of the President's Commission on Law Enforcement and Administration of Justice*, 233 (1967). The N.A.J.A. survey, based on more recent and more reliable data, suggests there may be as many as 6,250,000 such arrests each year in the entire country.

[14] Appellee's argument that recognition of alcoholism as a defense to a charge of public intoxication will open the floodgates of crime has already been disposed of at pages 56-57 of the brief for Amici Curiae.

[15] See, e.g., Pittman, *Public Intoxication and the Alcoholic Offender in American Society*, in The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Drunkenness*, App. A, at 14: "there are as yet no data that demonstrate that alcoholism is a significant factor in the commission of crimes."

[16] *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

ism is not a form of insanity and Appellant has never suggested that it is.

Appellee prefers the ALI formulation of "insanity"[11] that has now been adopted in several jurisdictions, to the *Durham* formulation as modified by McDonald.[12] To the extent that any formulation of the insanity defense is relevant to this case, the broad "mental disease or defect" concept underlying the ALI rule is clearly the approach that should be applied to the analogous, but nevertheless separate, problem of alcoholism. Section 4.01 of the Model Penal Code provides a defense where the individual "lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." An alcoholic's intoxication squarely fits this defense, except that his lack of capacity is the result of alcoholism rather than of a mental disease or defect.

5. *Robinson v. California*

In arguing that *Robinson* should be limited to its facts, Appellee sets up a distinction between a "status crime" and an "action crime." He is, however, unable to offer a *rationale* for this distinction. Nowhere is it explained why it is less cruel to punish a symptom of a disease than to punish the disease itself.

Appellee fails to distinguish the *Easter* and *Driver* decisions from the instant case. As the testimony in those cases showed, both Mr. Easter and Mr. Driver periodically abstained from drinking. Thus, Appel-

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[11] ALI Penal Code, Proposed Official Draft, § 4.01 (May 1962).

[12] *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1957).

lant's occasional sobriety hardly differentiates him either from Mr. Easter and Mr. Driver or from any other chronic alcoholic. In Texas, as well as North Carolina and the District of Columbia, alcoholism is defined by statute as loss of the power of self-control over the use of alcoholic beverages. In short, Appellee simply disagrees with *Easter* and *Driver*—and, presumably, also with *Sweeney* and the other cases that hold that an alcoholic drinks involuntarily.

6. APPELLEE'S ALTERNATIVE TO CRIMINAL PUNISHMENT.

Finally, Appellee suggests that penal incarceration is preferable to less humane civil commitment, and therefore is justifiable on that basis. The short and obvious answer to this contention is that a State is no more justified in using civil commitment to punish alcoholics than it is in employing criminal procedures for this purpose. Is Appellee suggesting that if this Court reverses the lower court's decision the State of Texas will devise alternative means to punish alcoholics?

Appellee rejects, without discussion, the solution recommended by the U.S. and D.C. Crime Commissions—voluntary treatment. The FBI Law Enforcement Bulletin for December 1967 contains an article by the St. Louis Chief of Police describing that city's new detoxification center—the first innovation in handling public inebriates in over 100 years. The center has resulted in a 57% reduction in the time police officers must spend in handling intoxicated persons, a 60% reduction in drunkenness arrests, and a 97% voluntary response by the inebriates who have utilized

it. This response to a facility that it admittedly only one component of a comprehensive program, which must eventually also provide inpatient and outpatient treatment, provides tremendous hope for the future, and validates the U.S. and D.C. Crime Commissions' recommendations.

The World Health Organizations has just stated that:

> "The treatment of persons dependent on alcohol, with the best methods available, has produced encouraging results. Marked improvement or social recovery has been reported in up to 50-70% of cases, depending mainly on the underlying personality of the person treated. The proportion of therapeutic failures is generally higher among abusers of other drugs. . ..." WHO Expert Committee on Mental Health, *Services for the Prevention and Treatment of Dependence on Alcohol and Other Drugs,* Tech. Rep. Ser. No. 363, at 24 (1967).

The pessimism—and vindictiveness—expressed by the Texas Attorney General regarding alcoholics finds no support among the professional organizations interested in handling this problem on a new, humane, and effective basis.

On December 21, 1967, the Supreme Court of the State of Washington ruled, over three dissents, that alcoholism is not a defense to drunkenness. *Seattle v. Hill,* 435 P.2d 692 (1967). The majority of five judges (two of whom concurred only in the result) concluded that, since 90% of all alcoholics are not *convicted* of public drunkenness, every alcoholic has "the power to make a choice." They relied upon the hornbook rule that "Drunkenness is not to be regarded as involuntary * * * merely because it is the result of an inordi-

nate and irresistible appetite for drink, overcoming the will and amounting to a disease"—the old *Potts*[10] rule—in holding that the Seattle drunkenness ordinance is "applicable to chronic addictive alcoholics." 435 P.2d at 698, 699, 700, 703. One of the two judges who concurred only in the result felt constrained to point out that he agreed "with much that is said in the dissent, particularly with that portion which points out that the criminal-law approach to chronic addictive alcoholism, as manifested by public drunkenness, is a total and costly failure." 435 P.2d at 703.

The three dissenting judges accepted the rationale of *Easter* and *Driver,* namely, that an alcoholic may not constitutionally be convicted for the involuntary product of his illness. They emphasized that the majority's conclusion that an alcoholic is not sick but merely weak-willed, is inconsistent with the uncontradicted record evidence and contrary to all medical authority. In their view, an alcoholic's appearance in public when intoxicated is as inevitable and as involuntary as his drunkenness. The fact that only indigent or derelict alcoholics are convicted for public drunkenness hardly demonstrates that all alcoholics are able to control either their drinking or their appearance in public while intoxicated. 435 P.2d at 704-707, 709-710.

The approach of the majority in *Hill,* which adopts the *Potts* rule, is identical to that of the D.C. Court of Appeals in the *Easter* case,[11] which was subsequently reversed by a unanimous U.S. Court of Appeals sitting *en banc,* and to Appellee's argument in the instant

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[10] *State v. Potts,* 100 N.C. 457, 6 S.E. 657 (1888).

[11] *Easter v. District of Columbia,* 209 A.2d 625 (D.C. Ct. App. 1965), rev'd, 361 F.2d 50 (D.C. Cir. 1966) *(en banc).*

case. The fallacies of this approach have been documented by the dissent in *Hill,* by the *Easter, Driver,* and *Sweeney* opinions, by the U.S. and D.C. Crime Commissions, and by the other authorities cited in the briefs previously filed in this case in support of Appellant.

CONCLUSION

Appellant therefore requests that the decision of the lower court be reversed.

Respectfully submitted,
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March, 1968

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief for Appellant were served on the Honorable Crawford Martin, Attorney General for the State of Texas, on this ____ day of March, 1968, by delivery in person to his office located at the Supreme Court Building, Capitol Station, Austin, Texas.

TOM H. DAVIS

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assessing responsibility in criminal cases. Since these classifications were familiar, however, many phychiatrists understandably used them in court despite their unsuitability. And some psychiatrists, perhaps unwittingly, permitted their own notions about blame to determine whether the term mental illness should be limited to psychoses, should include serious behavior disorders, or should include virtually all mental abnormalities.'"

* * * *

"[T]estimony in terms of 'mental disease or defect' seems to leave the psychiatrist too free to testify according to his judgment about the defendant's criminal responsibility."[10]

"An alternative to *Durham-McDonald*[11] would be to make the ultimate test whether or not it is just to blame the defendant for his act. If the question were simply whether it is 'just' to 'blame' the defendant, then mental illness, productivity, ability to control oneself, etc., might be factors which the jury could consider in reaching its conclusion on the justness of punishment. Since the words 'just' and 'blame' do not lend themselves to refined definition, the charge to the jury under this test probably would not be detailed. But the words that have been used in other charges, such as 'defect of reason,' 'disease of the mind,' 'nature and quality of the act,' 'behavior controls,' 'mental disease or defect,' 'capacity . . . to appreciate the

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[9]Text of opinion accompanying footnote 7-9. (citations omitted)

[10]Text of opinion accompanying footnote 26.

[11]*McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) defined "mental disease or defect" as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." See our brief in chief at 20.

criminality of his conduct,' and 'capacity to conform his conduct to the requirements of law,' are also vague—the chief difference being that these words give a false impression of scientific exactness, an impression which may lead the jury to ignore its own moral judgment and defer to the moral judgment of scientific 'experts.' However, we are unaware of any test for criminal responsibility which does not focus on the term 'mental illness,' or some closely similar term. This focus may be unfortunate, but we are not deciding that question now, and are not proposing to abandon the term.'"[11]

In a footnote written on behalf of himself Chief Judge Bazelon indicated that his Court might eventually consider itself forced to eliminate the insanity defense entirely or change it as to make it less related to the medical model."[12]

It is extraordinary that while the Court of Appeals is expressing such root doubts of the meaningfulness and wisdom of its attempt to relate criminal responsibility to concepts of "disease" and "behavior control," in spite of more than thirteen years of intensive and continuous judicial effort, the Supreme Court is asked to adopt similar criteria for every jurisdiction in the United States.

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[11]Footnote 23.
[12]Footnote 33.